Supreme Court, U.S.
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No. 99-967

IN THE

Supreme Court of the United States

ALBERT G. MACLEOD,

Petitioner,

v.

GEORGETOWN UNIVERSITY MEDICAL CENTER,
JAMES A. RICHARDSON, M.D. AND THOMAS O. STAIR, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The proper legal name of Respondent, Georgetown University Medical Center, is "The President and Directors of Georgetown College."

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STATEMENT OF THE CASE

Petitioner seeks this Court's review of the District of Columbia Court of Appeals' unanimous opinion affirming summary judgment against Petitioner in a medical malpractice suit. Petitioner had filed a common law tort action alleging Respondents, Georgetown University Medical Center, James A. Richardson, M.D., and Thomas O. Stair, M.D. (hereinafter collectively "Respondents"), had been negligent in their care and treatment of him and seeking money damages. Set forth below is a summary of the facts and a history of the proceeding.

Petitioner presented to the emergency room at the Georgetown University Medical Center complaining of left ear pain and decreased hearing since the previous day. *See* C.A. App. at 21. Upon examination of Petitioner, it was determined that his ears were compacted with cerumen (ear wax). An irrigation of the ears was attempted to remove the cerumen. *Id.* Petitioner could not tolerate this procedure, and it was stopped at his request. *Id.* Petitioner was discharged from the emergency room with a diagnosis of ear pain and possible otitis media, an infection of the middle ear. *Id.*

Petitioner had a follow-up visit with an otolaryngologist at Georgetown, Dr. Michael Morris, who was later identified by Petitioner as an expert witness. *See* C.A. App. at 38. A CT scan was obtained, which revealed an inflammatory process in the inner and middle left ear. *Id.* at 46. According to Dr. Morris, this inflammatory process was unrelated to the irrigation of Petitioner's ears undertaken in the emergency room and was consistent with the complaints made by Petitioner in the emergency room. *Id.* at 46-47. Contrary to

Petitioner's assertion in his Petition for a Writ of Certiorari (hereinafter "Pet."), at 2, Dr. Morris did not indicate Respondents had committed malpractice. *See* C.A. App. at 47. Indeed, no physician has ever so stated.

Petitioner filed a *pro se* medical malpractice claim against Respondents alleging negligence in the treatment he received in the emergency room and claiming permanent ear damage as a result. Pet. App. at 15a-16a. District of Columbia case law requires that, in the vast majority of medical malpractice cases, a plaintiff must provide expert testimony of malpractice in order to make out a prima facie case. *See, e.g., Woldeamanuel v. Georgetown University Hospital*, 703 A.2d 1243 (D.C. App. 1997). Further, pursuant to the District of Columbia Superior Court Rule of Civil Procedure 26(b)(4), during discovery Petitioner was required to file a statement detailing the opinions of his expert witnesses.

Petitioner filed a deficient Rule 26(b)(4) Statement, in which Petitioner named four experts but, in violation of Superior Court Civil Rule 26(b)(4), did not provide any information regarding the subject matter on which each expert witness was expected to testify, the substance of the facts and opinions to which each expert was expected to testify, and a summary of the grounds for each such opinion. *See* C.A. App. at 38. Subsequently, Respondents filed a motion for summary judgment under Superior Court Rule 56. In their motion, Respondents gave a clear explanation of what the case lacked; specifically, that Petitioner had failed to provide any expert testimony establishing a *prima facie* case of malpractice. Pet. App. at 16a. In support of their motion, Respondents provided affidavits from all four of Petitioner's experts. Each affidavit stated there was no malpractice by any of the Respondents. C.A. App. at 40-50.

In Petitioner's opposition to Respondents' summary judgment motion, Petitioner made a conclusory assertion that two of his treating physicians, Dr. James and Dr. Morrison, would opine that Respondents had breached the standard of care. Pet. App. at 19a. Neither of these treating physicians had been named as an expert witness in Petitioner's Rule 26(b)(4) Statement, however. *See* C.A. App. at 38; Pet. App. at 3a. Moreover, Petitioner provided no evidence, *by affidavit or otherwise*, to support his assertion that the physicians would indeed so testify. Thus, the only evidence before the trial court was that the Respondents did not violate any standard of care. Accordingly, Respondents' motion for summary judgment was granted.

Petitioner appealed the granting of summary judgment, contending that the trial court erred in failing to advise him of the need to file affidavits with his opposition to the motion for summary judgment. The District of Columbia Court of Appeals affirmed the trial court's decision, holding that under the circumstances presented the trial court had no duty to advise Petitioner of deficiencies in his opposition to Respondents' motion, specifically including the importance of filing controverting affidavits. Pet. App. at 2a.

A. The petition misrepresents whether a federal question is properly presented.

The District of Columbia Court of Appeals made clear in this case that, under the law of the District of Columbia, *pro se* litigants should not ordinarily expect special treatment simply because of their *pro se* status. Pet. App. at 5a. In setting forth that principle of law, the D.C. Court of Appeals included citations to decisions from other state courts, as well as cases from the United States Court of

Appeals for the District of Columbia Circuit and other federal circuits. Petitioner misconstrues the illustrative use of these cases as presenting a "federal question." *See, e.g.*, Pet. at 4. Petitioner is incorrect.

The law of the D.C. Circuit federal court, while helpful in interpreting local rules patterned after the Federal Rules of Civil Procedure, is not controlling authority for the District of Columbia Court of Appeals. *See M.A.P. v. Ryan*, 285 A.2d 310 (D.C. App. 1971). The mere citation of federal case law in support of an opinion based solely on state law grounds does not present a federal question.

Petitioner also presents several alleged "federal questions," such as his reference to the equal protection clause of the United States Constitution. *See, e.g.*, Pet. at 5. Whether or not such claims would constitute "federal questions" for review if properly raised, there is no federal question to be reviewed by this Court because such claims were never considered by the Court of Appeals. Despite Petitioner's assertions to the contrary, no federal question was raised below.

Petitioner asserts the D.C. Court of Appeals rejected his equal protection argument. Pet. at 5. The record in this case, however, establishes that Petitioner made no such argument before the D.C. Court of Appeals. Petitioner also asserts he contended that Rule 56 violated the due process clause of the Fifth Amendment. *Id.* Again, the record shows that no such argument was presented to the D.C. Court of Appeals. It is settled law that a litigant may not raise for the first time on appeal arguments not presented to the lower court for consideration. *See, e.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

In short, there is no federal question properly before this Court to review. Any "federal questions" proffered by Petitioner were not presented to the lower court and did not form the basis of the lower court's decision. Moreover, contrary to Petitioner's claims, *e.g.*, Pet. at 5, the Court of Appeals did not hold that prisoner *pro se* litigants were entitled to notice of the need for controverting affidavits, but non-prisoner *pro se* litigants were not. Rather, the Court of Appeals held that, for reasons going far beyond Petitioner's status as a non-incarcerated *pro se* litigant, the trial court had no affirmative duty to assist Petitioner in presenting his case by instructing Petitioner on the need for controverting affidavits. The lower court's holding turned on the circumstances presented by this individual case, not the mere status of the *pro se* litigant. Pet. App. at 7a (noting Petitioner's proposed requirement "goes too far in the circumstances here").

Petitioner misreads the D.C. Court of Appeals' rejection of Petitioner's argument regarding procedures used in cases involving prisoner *pro se* litigants as setting forth a ruling of law that prisoner *pro se* litigants constitute a "special class," to which Petitioner does not belong, which is afforded special treatment. Pet. at 21. The D.C. Court of Appeals made no such holding. Rather the D.C. Court of Appeals simply held that Respondents are entitled to judgment as a matter of law given Petitioner's failure to offer any evidence establishing a genuine of material fact supporting Petitioner's claims of medical malpractice.

B. The petition misrepresents this case as arising under a split among the federal circuits.

The Petition misrepresents this case as arising under a split among the federal circuits. Pet. at 21. Similarly to Petitioner's misunderstanding whether this case presents a "federal question," *see supra* at 4, Petitioner's claims on this issue misconstrue the significance of the District of Columbia Court of Appeals' illustrative citation of federal court decisions in affirming the Superior Court of the District of Columbia. This case arises under the state law of the District of Columbia and was decided by a state court.[1]

It is clear that the D.C. Court of Appeals decided this matter on state law grounds. The D.C. Court of Appeals affirmed the trial court's ruling that Petitioner failed to satisfy the requirements of Rule 26(b)(4) of the Superior Court Rules of Civil Procedure regarding disclosure of Petitioner's proffered expert testimony. The D.C. Court of Appeals also affirmed the trial court's ruling that, in responding to Respondents' motion for summary judgment under D.C. Superior Court Rule 56, Petitioner's reliance on mere conclusory statements that he would elicit expert testimony at trial from his treating physicians that the Respondents had violated the standard of care is insufficient to establish a genuine issue of material fact regarding an alleged violation of the standard of care and avoid summary judgment under District of Columbia case law and D.C. Superior Ct. Civ. Rule 56.

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1. The District of Columbia Court of Appeals and the Superior Court of the District of Columbia are Article I courts. They are considered state courts for purposes of Supreme Court review. 28 U.S.C. § 1257(b).

As detailed below, there is no cause for this Court's review as the decision below did not consider any federal question and was based upon adequate state grounds. Moreover, this decision does not confront the Court with a split in the circuits since it arises out of a final judgment of a state court decided under substantive state law. Finally, Petitioner's complaint was properly dismissed as it failed to state a *prima facie* case of medical malpractice.

REASONS FOR DENYING THE WRIT

I. The non-federal court below did not consider the alleged federal question presented in the petition and therefore certiorari should be denied.

It is essential to Supreme Court jurisdiction under 28 U.S.C. § 1257 that a substantial federal question was raised below. As stated by this Court in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." This Court has previously held that mere reference to "due process of law" or "the Constitution of the United States" is insufficient. *See, e.g., Bowe v. Scott,* 233 U.S. 658, 664-665 (1914); *Herndon v. Georgia,* 295 U.S. 441 (1935); *Hardy v. Illinois*, 196 U.S. 78 (1904). This Court is not vested with jurisdiction unless a federal question was raised and decided below, *Cardinale v. Louisiana*, 394 U.S. 437 (1969), and this Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

As this Court stated in *Lynch v. New York ex. Rel. Pierson*, 293 U.S. 52, 54 (1934), in discussing a Fourteenth Amendment argument not raised properly in the lower courts,

> Jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that the judgment as rendered could not have been given without deciding it.

Id. at 54.

In the case at bar, Petitioner never raised the issues of any alleged violation of due process or equal protection under the Fifth Amendment in the trial court or in the D.C. Court of Appeals. (Pet. App. 15a-19a). Therefore, a federal question was not properly raised below. Moreover, since such issues were not raised, the alleged Constitutional issues were never addressed at the appellate level below. For both of these reasons, this Court has no jurisdiction over this matter under 28 U.S.C. § 1257.

In the recent case of *Adams v. Robertson*, 520 U.S. 83 (1997), this Court reiterated its long held position that, "with 'very rare exceptions' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 . . . we will not consider a petitioner's federal claim unless it

was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Id.* at 208 (citations omitted). The burden of showing that a federal question was presented below is upon Petitioner. *Id.* In the *Adams* case, the petitioner was unable to demonstrate that an alleged violation of the Due Process Clause of the Fourteenth Amendment was raised below and the writ of certiorari was dismissed as improvidently granted. *Id.* at 210-11. As stated by the *Adams* court, " 'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 210 (citing *Webb v. Webb*, 451 U.S. 493, 500 (1981)).

Likewise, in the case at bar, there has been no showing by Petitioner that the court below addressed or based its decision on a federal question. Accordingly, the petition for writ of certiorari should be denied.

II. The decision below was based upon adequate state grounds.

This Court has consistently declined to review a state court judgment which was based on independent state grounds, even if (unlike the case at bar) a federal question was involved and decided below. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908).

In the case at bar, the D.C. Court of Appeals held that Petitioner failed to meet the requirements of District of Columbia Superior Court Civil Rule 56(e) in opposing Respondents' motion for summary judgment. Pet. App. at 19a. That reason alone was the basis for affirming the

dismissal of Petitioner's lawsuit. While Superior Court Civil Rule 56 is similar to Federal Rule of Civil Procedure 56, any federal case law interpreting the federal rule counterpart to Superior Court Rule 56 is merely instructive as to the interpretation of Superior Court Civil Rule 56. It is not binding. *See Simpson v. Chesapeake & Potomac Telephone Co.*, 522 A.2d 880, 884 n.4 (D.C. 1987); *Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 807 (1984).

State procedural rules, which serve as the basis for an appellate decision, are honored as long as they "serve a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443 (1965); *see also Wainwright v. Sykes*, 433 U.S. 72 (1977); *Monger v. Florida*, 405 U.S. 958 at 961-963 (1972); *Douglas v. Alabama*, 380 U.S. 415 (1965). Moreover, a local rule of procedure that does not discriminate against the raising of a federal claim, and is of a substantive nature, will not be disturbed. *Wainwright, supra*, 433 U.S. at 81.

The District of Columbia Superior Court and the District of Columbia Court of Appeals are distinct, non-federal courts for purposes of 28 U.S.C. § 1257. Their procedural rules are given deference and effect, as is case law applying those rules. In its decision in this matter, the District of Columbia Court of Appeals held that D.C. Superior Court Civil Rule 56 does not mandate the trial court to provide *pro se* litigants in civil cases with specific notice of the need to file countervailing affidavits to avoid summary judgment. This state court interpretation of a state court rule of procedure is clearly an adequate state ground for the decision.

III. Any "split in interpretation" among the United States Circuit Courts of Appeal regarding the need for notice to pro se litigants under Federal Rule of Civil Procedure 56 is irrelevant to this state court decision based on state law.

Petitioner has suggested to this Court that a split of authority exists among various United States Circuit Courts of Appeal as to the need to provide notice to a *pro se* litigant of what must be submitted in opposition to a motion for summary judgment under Federal Rule of Civil Procedure 56. *See* Pet. at 13-18. While such a split of authority may exist in the federal court system with respect to the Federal Rules of Civil Procedure, this Petition arises from the decision of a state court. Furthermore, this case arises under the state law of the District of Columbia. The decision of the Superior Court of the District of Columbia was based upon its interpretation of Superior Court Civil Rule 56. While federal law interpreting the Federal Rule counterpart is instructive, it is not controlling. The trial court decision in this case was affirmed by the District of Columbia Court of Appeals, on the basis of its interpretation of the District of Columbia Rules of Civil Procedure.

This is not a case where a state court and a Federal Circuit Court of Appeal disagree on the interpretation of a federal statute or a question of federal law. As noted above, this case involves application of a state court rule of procedure by a state court. Any disagreement that may exist among certain United States Circuit Courts of Appeal as to Federal Rule of Civil Procedure 56 is irrelevant to the decision of a state court based upon state law grounds.

IV. Non-incarcerated pro se litigants are not denied access to the Courts by lack of a Rule 56 notice as Superior Court Civil Rule 56 is clear on its face.

Petitioner argues that *pro se* litigants are denied access to the courts due to the lack of a separate Rule 56 notice regarding countervailing affidavits. This statement pre-supposes that non-incarcerated *pro se* litigants should not be bound by the same procedural rules as all others. It also pre-supposes that Superior Court Civil Rule 56 is unclear or that the properly given notice in a adversary's motion that it is made under Superior Court Civil Rule 56 is unclear. This Court in *McNeil v. United States*, 508 U.S. 106 (1993), held that civil litigants seeking money damages are not to be treated differently. The exceptions to this general rule are limited to narrow circumstances including pleading matters, including timely service of process; remedial statutes involving civil rights; and incarcerated litigants. Pet. App. at 7a. The Petition does not involve any of those exceptions, although Petitioner would like the Court to treat him as an incarcerated *pro se* litigant.

The reasoning behind the differing treatment of incarcerated *pro se* litigants was clearly set forth by the D.C. Circuit Court of Appeals in *Hudson*, *supra*. The *Hudson* Court noted that incarcerated litigants are under "handicaps . . . [which] detention necessarily imposes upon a litigant." *Id.* at 1094 (citing *Phillips v. United Sates Board of Parole*, 122 U.S. App. D.C. 235, 325 F.2d 711 (1965)). Petitioner has demonstrated no basis for inclusion in one of these categories or that a basis exists to modify these exceptions.

Petitioner's Complaint was dismissed by the District of Columbia Superior Court based on the Superior Court's

application of Superior Court Civil Rule 56. C.A. App. at 15. In affirming the dismissal, the District of Columbia Court of Appeals noted that the "[Respondents'] motion gave a clear explanation of what the case lacked [expert testimony as required by [Rules 16 and 26(b)(4)]" Pet. App. at 3a. The D.C. Court of Appeals quoted the trial court's decision regarding Superior Court Civil Rule 56(e)'s clear mandate that " an adverse party must not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided for in this Rule, must set forth specific facts showing there is a genuine issue for trial." Pet. App. at 3a. Petitioner did not comply with the plain and unambiguous language of this state court Rule and Petitioner's claim was treated accordingly.

The District of Columbia Courts of Appeals correctly held that, under Superior Court Rule 56, *pro se* non-prisoners are not entitled to special notice of how to oppose a summary judgment motion, Pet. App. at 11a. The D.C. Court of Appeals, while recognizing that parties may represent themselves, reiterated the "principle that 'such a litigant can expect no special treatment from the court.' " Pet. App. at 11a (citing *Abell v. Wang*, 697 A.2d 796, 804 (D.C. 1997)). The D.C. Court of Appeals went on to state,

> Our own federal appellate circuit court, in an opinion by then Judge Scalia, has explained that "[a]t least where a litigant is seeking a monetary award, we do not believe pro se status necessarily justifies special consideration (citations omitted)". While such a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts. . . .

Pet. App. at 11a (citing *Dozier v. Ford Motor Co.*, 227 U.S.App.D.C. 1, 6, 702 F.2d 1189, 1194 (D.C. Cir. 1993)). The D.C. Court of Appeals went on to delineate three categories requiring special treatment of *pro se* litigants: pleading matters, including timely service of process; remedial statutes involving civil rights; and, lastly, incarcerated litigants. Pet. App. at 7a.

The specialized situation of *pro se* incarcerated litigants, which was at issue in many of the cases relied on by Petitioner, is irrelevant to the case at bar. While the D.C. Court of Appeals has recognized that special consideration must be given to *pro se* incarcerated litigants under the holding in *Hudson v. Hardy*, 134 U.S. App. D.C. 44, 412 F.2d 1091 (1968) (as binding on it under *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)), the D.C. Court of Appeals in this case specifically considered the facts of this case in ruling that Petitioner is not entitled to such special consideration. In so holding, the D.C. Court of Appeals relied on this Court's statement, in *McNeil v. United States*, 508 U.S. 106, 113 (1993), that, "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." Pet. App. at 8a.

The D.C. Court of Appeals also cited with approval the reasoning of the United States Court of Appeals for the Ninth Circuit analysis in *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.4 (9th Cir. 1986), for not imposing a burden on trial courts to act as an advisor for non-incarcerated *pro se* litigants on matters of litigation process. Pet. App. at 13a. The *Jacobsen* court stated that imposing such a role on trial courts would be improper for several reasons,

> First and foremost is that pro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. Trial courts generally do not intervene to save litigants from their counsel of choice, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses *himself* as legal representative should be treated no differently. In both cases, the remedy to the party injured by his representative's error is to move to reconsider or to set aside; it is not for the trial court to interject itself into the adversary process on behalf of one of a class of litigant.
>
> Imposing an obligation to give notice of Rule 56's evidentiary standards would also be to invite an undesirable, open-ended participation by the court in the summary judgment process . . . Unlike the conversion of a 12(b)(6) motion into a motion for summary judgment, which only requires notice of what the motion now *is*, Jacobsen's proposal requires advice as to what the motion must *mean*. To give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee.

Jacobsen, 790 F.2d at 1365-66 (emphasis in original) (footnotes omitted).

As this Court stated in *McNeil*, *supra*, 508 U.S. at 113 (citing to *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

V. The dismissal of petitioner's complaint was correct due to petitioner's failure to present a prima facie case of medical malpractice under the case law of the District of Columbia.

Under governing District of Columbia law, to prevail in a medical malpractice case, a plaintiff must establish: (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) a causal relationship between that deviation and the plaintiff's injury. *Woldeamanuel v. Georgetown University Hospital*, 703 A.2d 1243, 1244 (D.C. 1997) (quoting *Meek v. Shepard*, 484 A.2d 579, 581 (D.C. 1984)); *accord Washington v. Washington Hospital Center*, 579 A.2d 177, 181 (D.C. 1990); *Psychiatric Institute of Washington v. Allen*, 509 A.2d 619, 623-624 (D.C. 1986).

Because these issues are related to some distinct science, profession, or occupation, expert testimony is usually required to prove each of these elements. *Washington, supra*, 579 A.2d at 181; *Psychiatric Institute, supra*, 509 A.2d at 623-24; *Woldeamanuel, supra,* 703 A.2d at 1244; *Allen v. Hill*, 626 A.2d 875, 877 (D.C. 1993). Thus, in order for a *prima facie* case of medical malpractice to be established expert testimony is needed. In the *Woldeamanuel* case, the D.C. Court of Appeals held that a litigant's allegations of medical malpractice, unsupported by anything other than her own conclusory allegations and unsworn testimony of a physician, is insufficient to defeat a motion for summary judgment. *Id.* at 1245.

In the case at bar, expert witness disclosure requirements are governed by D.C. Superior Court Civil Rule 26(b)(4), which requires the pretrial disclosure of all expert witness testimony that the parties intend to present at trial. As the

trial court and the D.C. Court of Appeals recognized, applying this Rule in the context of established District of Columbia law, a statement from an expert supporting the Petitioner's claim of malpractice was required for the trial court to find a genuine issue of material fact sufficient to defeat the Respondents' motion for summary judgment under Superior Court Civil Rule 56. As in *Woldeamanuel*, summary judgment in the case at bar was appropriate based on the Petitioner's complete failure to offer proof concerning the standard of care and any alleged breach of the standard of care, and the alleged causal nexus between the breach and Petitioner's injuries.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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